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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

INFINITY ENERGY, INC., a
California Corporation,
Plaintiff,
v.
INFINITE ENERGY HOME
SERVICES, INC., a California
Corporation,
Defendant.

Case No. 2:21-cv-00438-WBS-KJN
Hon. William B. Shubb

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE,
MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: May 30, 2023
Time: 1:30 p.m.
Location: Courtroom 5

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QUESTION PRESENTED

The Lanham Act provides that a person's tradename does not violate a registrant's rights to a trademark unless he uses the tradename in a manner likely to confuse. Plaintiff is in the Solar industry and has a servicemark for "Infinity Energy". Plaintiff is accusing Defendant of intentionally using Defendant's tradename "Infinite Energy Home Services" to confuse people as to the source of Plaintiff's services. Plaintiff can show that Plaintiff's servicemark shares a linguistic element with Defendant's tradename. Although Plaintiff alleges actual and likely consumer confusion, Plaintiff's materials lack objective evidence of consumer opinion and objective evidence of actual confusion.

13 Discovery is now closed. Is there enough for the trier of fact to
14 conclude that Defendant is likely to confuse?

STATEMENT OF FACTS

16 This dispute is over the legal right to a concept and who owns
17 how much of it. The concept is a business venture into the Solar
18 industry under the brand "Infinity Energy."

19 Plaintiff Infinity Energy, Inc. ("Plaintiff") and Defendant
20 Infinite Energy Home Services, Inc. ("Defendant") are two separate
21 companies with two separate versions of the same concept. A few years
22 ago, Plaintiff realized that it was not alone in this venture and there
23 were others who had come up with similar ideas. So, in 2020, Plaintiff
24 claimed its own rights to name Infinity Energy at the United States
25 Patent and Trademark Office ("USPTO") (SUF 1-5¹)

26 Defendant, with the tradename "Infinite Energy," was dabbling in

¹ All "SUF" citations refer to the Separate Statement of Undisputed Facts accompanying Defendant's motion.

1 Solar energy when it happened to be spotted by Plaintiff. Having been
 2 eyeing Defendant for a few years, Plaintiff filed suit as soon as it
 3 got its hands on the registration certificate. (SUF 5; Plaintiff's
 4 Complaint (Mar. 10, 2021) ECF No. 1) Suddenly Defendant was handed a
 5 long list of arbitrary accusations and found itself in Federal court.
 6 Unfortunately for Defendant, it is missing a USPTO certificate over its
 7 tradename. It makes do with what it can get under the common law.

8 So, Plaintiff accuses Defendant of running away with Plaintiff's
 9 idea and diverting its target audience. Although in its Complaint,
 10 Plaintiff admits that Defendant's tradename is not identical to
 11 Infinity Energy. Instead, Defendant's tradename is Infinite Energy.
 12 (Plaintiff's First Amended Complaint ("Am. Compl.") ECF No. 7, ¶¶ 15-
 13 16) Plaintiff is deeply concerned. It is convinced that Defendant is
 14 going to cause market-wide confusion. It thinks Defendant already
 15 did. (Am. Compl. ¶¶ 7, 31-32, 34)

16 Under 15 U.S.C. § 1127, Plaintiff has the right to a servicemark
 17 for the name Infinity Energy. It is a word character mark. Plaintiff
 18 is prevented from enforcing its right over a particular design, style,
 19 font, or color. (SUF 1-5) Before letting Plaintiff enter the registry,
 20 USPTO forbade Plaintiff the exclusive rights to the word Energy. (SUF 3)
 21 Evidently, the idea is not original and common to everyone in the
 22 industry. So, Plaintiff turned the word over and wrote into the record
 23 that the servicemark were to be used in connection with only the
 24 "installation of Solar energy systems and alternative energy products
 25 for residential and commercial use." (SUF 1) This is the limit to the
 26 Plaintiff's rights over the overall concept. And this servicemark is
 27 the only issue in this dispute.

28 Plaintiff uses the servicemark to service Solar energy in seven

1 states: California, Texas, Nevada, Idaho, Florida, Colorado, and New
2 Jersey. (SUF 16) Defendant is in three counties: El Dorado, Placer, and
3 Sacramento, all within California. (SUF 17)

4 To show how similar Defendant's tradename is to Plaintiff's
5 servicemark, Plaintiff brings in an expert on language and linguistics
6 during discovery. The expert closely examines the words Infinity and
7 Infinite and says there is barely a difference. (SUF 24) Plaintiff and
8 Defendant proceed to litigate over it for two years.

9 Discovery closes. In the end, they find that the word Infinity is
10 similar to the word Infinite. Most Solar companies happen to agree.
11 Because they also use the word Infinity to market Solar energy. (SUF 10)

12 Nobody disagrees that Solar energy comes from the Sun. (SUF 9)
13 Presumably, the Sun must have an infinite supply of Solar energy. Having
14 also made the connection, Defendant deposes the Cameron Kelly -who
15 claims to have come up with the idea to open up a business in the name
16 of Solar energy and call it Infinity Energy. (SUF 7)

17 "Is the name Infinity Energy unique?" Answer no. "Do you think it
18 would be a common name for a Solar company?"

19 "Common idea, but common ideas don't necessarily need to be replicated,"
20 says Cameron Kelly.

21 But then he immediately continues "the word energy is very common
22 in the Solar space." "I was going to say, being used together, I should
23 say, is not necessarily a common idea. Because Infinity has nothing to
24 do with power." (SUF 7; Def. Ex. D, 31:5-22)

25 Though his case is not about how an obvious idea to open a business
26 in Solar energy and call it Infinity Energy. This is also a case where
27 Plaintiff is asking the trier of fact to determine whether Defendant
28 uses its tradename in such a way that it is causing a likelihood of

1 deception or confusion among customers, and whether Defendant does so
2 with malice.

3 Plaintiff insists that Defendant has a scheme to use its tradename
4 Infinite Energy to intentionally cause confusion in the marketplace.
5 According to Plaintiff, Defendant's plan is to pass off its services
6 as Plaintiff's so that Defendant can exploit Plaintiff's reputation for
7 profit. Plaintiff claims Defendant planned all this to cash in on
8 Plaintiff's business. Plaintiff's Complaint decorates this theory with
9 colorful words, e.g., conduct that is intentional, knowing, malicious,
10 fraudulent, and so on. (Am. Compl. ¶ 7, 32-34, 39-40, 47)

11 But Plaintiff omitted to interview any customers about any of this
12 to see whether people were actually confused between Plaintiff and
13 Defendant's services. In fact, Plaintiff did not interview any
14 customers about anything related to Plaintiff's mark. And Plaintiff did
15 not even track or poll any customers to gauge public opinion. Above
16 all, Plaintiff did not conduct a consumer survey to test for the
17 likelihood of confusion between Plaintiff and Defendant. (SUF 21-23,
18 27)

19 Throughout the Complaint, Plaintiff repeatedly claims that
20 Defendant not only confused Plaintiff's customers and killed over a
21 million dollars worth of profit, but that Defendant did it with
22 malicious intent. (Am. Compl. ¶¶ 24-25, 27-28 32-34, 46-47) Plaintiff
23 throws two factual allegations into the Complaint that Plaintiff claims
24 to show this apparent malice:

25 1. Plaintiff sent a cease-and-desist letter to Defendant
26 approximately six months before Plaintiff filed this suit (though the
27 letter attached as Exhibit 2 to Plaintiff's First Amended Complaint is
28 undated and unsigned.) The cease-and-desist letter reads: "[Plaintiff]

1 presumes [Defendant]'s knowing and willful adopting of the Infinite
2 Energy Home Services trademark was an intentional attempt to ride off
3 of the goodwill and reputation that [Plaintiff] has worked for many
4 years to create." The letter also notes: "I would also bet that
5 [Defendant] is receiving multiple calls per week from consumers who are
6 trying to reach [Plaintiff.]" (Am. Compl., Ex. 1)

7 2. Plaintiff's September 2020 registration of Infinity Energy
8 servicemark gave constructive notice to Defendant that Plaintiff owns
9 the rights to the servicemark. (Am. Compl. ¶ 25)

10 Thus, Plaintiff concludes, Defendant is conspiring to trade on
11 Plaintiff's goodwill and reputation to injure Plaintiff in a great and
12 irreparable way. (Am. Compl. ¶ 7, 32-34, 39)

13 Plaintiff's asserts four causes of action against Defendant: (1)
14 Federal Trademark Infringement under the Lanham Act § 32; (2) Federal
15 Unfair Competition, False and Designations of Origin under the Lanham
16 Act §43; (3) Unlawful, Unfair, Fraudulent Business Practices under
17 California Business & Professions Code § 17200 et seq; and (4)
18 Intentional Interference with Prospective Economic Advantage.

19 **Federal Trademark Infringement.** To prevail, Plaintiff must
20 show: (1) ownership of a registered trademark; (2) Plaintiff's use of
21 the mark before Defendant's; (3) Defendant's use of the mark without
22 Plaintiff's consent; and (4) Defendant's use is causing a likelihood
23 of confusion, mistake, or to deceive. 15 U.S.C. § 1114(1)(a); *Intel*
24 *Corp. v. Americas News Intel Pub., LLC*, No. C 09-05085 CRB, 2010 WL
25 2740063, at *2 (N.D. Cal. July 12, 2010)

26 **Federal Unfair Competition, False and Designations of Origin.** The
27 elements to this cause of action are identical to the elements of a
28 federal trademark infringement claim. Except Plaintiff's mark does not

1 have to be registered. 15 U.S.C. § 1125(a); *Intel Corp.*, *supra*.

2 **Unlawful, Unfair, Fraudulent Business Practices under California**
3 **Business & Professions Code § 17200 et seq.** Plaintiff brings this cause
4 of action under the Lanham Act. Plaintiff alleges "Defendant's actions,
5 in committed all of the aforesaid acts of infringement, were
6 'fraudulent' acts as meant by the UCL (Unfair Competition Law), in that
7 they were reasonably likely to deceive or mislead consumers.
8 Defendants' actions, as alleged herein, include practices which are
9 proscribed Cal. Civ. Code section 1770. By engaging in such proscribed
10 practices Defendant has committed "unlawful" acts as meant by the UCL."

11 (Am. Compl. ¶ 36-37)

12 The Ninth Circuit provides that "actions pursuant to California
13 Business and Professions Code § 17200 are 'substantially congruent' to
14 claims made under the Lanham Act. *Cleary v. News Corp.*, 30 F.3d 1255,
15 1263 (9th Cir. 1994); see also *Century 21 Real Estate Corp. v. Sandlin*,
16 846 F.2d 1175, 1178 (9th Cir. 1988) (holding that under both, the
17 "ultimate test" is "whether the public is likely to be deceived or
18 confused by the similarity of the marks.")

19 **Intentional Interference with Prospective Economic Advantage.**
20 Plaintiff's final cause of action has the following elements: (1) an
21 economic relationship between Plaintiff and some third party, with the
22 probability of future economic benefit to Plaintiff; (2) Defendant's
23 knowledge of the relationship; (3) intentional acts on the part of
24 Defendant designed to disrupt the relationship; (4) actual disruption
25 of the relationship; and (5) economic harm to Plaintiff proximately
26 caused by the acts of the defendant. *Della Penna v. Toyota Motor Sales*,
27 *U.S.A., Inc.*, 11 Cal. 4th 376, 389, (1995) Seemingly, Plaintiff fourth
28 claim is that Defendant's interference was infringement upon

1 Plaintiff's trademark "Defendant has intentionally engaged in wrongful
2 acts designed to interfere with or disrupt the relationship by,
3 including, but not limited to the acts designated supra in paragraphs
4 14 through 19 of this Complaint." (Am. Compl. ¶ 45)

5 Thus, each cause of action rests on Plaintiff's claims for
6 trademark infringement.

7 **ARGUMENT**

8 Under § 32 of the Lanham Act, a person who uses a name similar or
9 identical to a registered trademark does not violate the mark owner's
10 right unless the person's use is likely to confuse or deceive people.
11 This law intends to "protect persons engaged in . . . commerce against
12 unfair competition" by imposing liability on "deceptive and misleading
13 use of marks." 15 U.S.C. § 1127.

14 Defendant requests for the Court to "pierce Plaintiff's pleadings
15 and assess the proof in order to see whether there is a genuine need
16 for trial." Federal Rules of Civil Procedure, Rule 56 (amended 1963).
17 Given that the parties completed two years' worth of discovery, it is
18 proper for the Court to test whether there is any real basis for
19 Plaintiff's accusations. Fed. R. Civ. P. 56; see also *Jackson v. Werner*,
20 394 F. Supp. 805 (W.D. Pa. 1975).

21 If the record —with no room for controversy— establishes that the
22 chances of Plaintiff securing its burden of proof at trial to
23 demonstrate a violation of its rights are slim to none, Rule 56 is an
24 effective tool for this Court to draw a line in the sand. To that end,
25 if the record —with no room for controversy— establishes that no
26 reasonable member of the jury can or even given enough material to
27 conclude that Defendant is using a tradename in a way likely confusing
28 or deceiving consumers, this Court can use the full latitude of Rule 56



1 to enforce what the Lanham Act has intended all along.

2 Plaintiff's second cause of action for unfair competition and
3 false designation of origin under § 43 of the Lanham Act carries the
4 same burden of proof as the trademark infringement claim under § 32.
5 Plaintiff's third and fourth causes of action also rely on §§ 32, 43
6 of the Lanham Act, and so, fall the same burden of proof. As to the
7 first claim, to show trademark infringement, Plaintiff must demonstrate
8 a likelihood of confusion. Likelihood of confusion is circumstance-
9 specific and turns on consumer perception. And Plaintiff does not have
10 enough evidence to demonstrate one.

11 Because Plaintiff falls short of the required burden of proof, the
12 first cause of action for trademark infringement merits summary
13 judgement. If the Court agrees, then summary judgement also applies to
14 the other three claims. Because the remaining causes of action are all
15 pyramided on the trademark infringement claim, this Court should
16 dispose of this suit.

17 **A. Because Plaintiff's Evidence is in Deficit, Plaintiff will not**
18 **Survive the Burden of Proof required by Trial.**

19 Trademark infringement claims are not immune to summary
20 disposition. To push this case to a resolution, the Court can narrow
21 down the legal issues and eliminate the need for trial.

22 First, Defendant moves for summary adjudication on the issue of
23 likelihood of confusion because no reasonable juror can possibly find
24 that Defendant uses its tradename in a way that is causing a likelihood
25 of confusion among consumers.

26 If the case proceeds to trial, the burden awaiting Plaintiff is
27 nothing less than steep. The burden of proof does not just stop at a
28 mere possibility. Not only must Plaintiff demonstrate to the jury that



1 the likelihood of confusion Defendant is allegedly causing is *probable*,
2 but by the preponderance of the evidence, Plaintiff has the burden to
3 both produce the evidence and *persuade* the jury. *Rodeo Collection, Ltd.*
4 v. *W. Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987)

5 But Plaintiff's evidence reveals that Plaintiff falls short. Even
6 when we give Plaintiff the maximum benefit of all the admissible
7 evidence, including those Plaintiff *could* admit into evidence, a
8 reasonable jury cannot possibly find that consumers are likely confused
9 or deceived because of Defendant's use of its tradename. That is because
10 the record lacks objective evidence supporting neither a likelihood of
11 confusion, nor one that is attributable to Defendant. *Scott v. Harris*,
12 550 U.S. 372, 380 (2007); *See Celotex Corp. v. Catrett*, 477 U.S. 317,
13 325 (1986).

14 And Defendant shoulders its own burden to establish the basis for
15 this motion and the burden to identify the supporting materials as
16 follows: (1) Plaintiff cannot provide evidence to support a finding of
17 likelihood of confusion, which is an essential element of Plaintiff's
18 trademark infringement claim, (2) Defendant can present facts to negate
19 Plaintiff's belief that Defendant is likely causing confusion, (3) When
20 the two points weighed together, they reveal that no reasonable jury
21 member can find that there is a likelihood of confusion among consumers.

22 **B. A Sleekcraft Analysis Confirms that No Reasonable Jury Member
23 can Conclude that Defendant is Likely to Confuse.**

24 The Ninth Circuit instructs us to consider the eight-factor
25 *SleekCraft* test and adapt it as necessary to analyze the likelihood of
26 consumer confusion. *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*,
27 109 F.3d 1394, 1404 (9th Cir. 1997) citing *AMF Inc. v. Sleekcraft Boats*,
28 599 F.2d 341, 348--49 (9th Cir. 1979). *Sleekcraft* is not meant to be a

1 checklist. But Plaintiff "must demonstrate likely confusion, not mere
2 diversion." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*,
3 638 F.3d 1137, 1149 (9th Cir. 2011).

4 These eight factors are:

5 [1] strength of the mark; [2] proximity of the goods or
6 services; [3] similarity of the marks; [4] evidence of actual
7 confusion; [5] marketing channels used; [6] type of goods or
8 services and the degree of care likely to be exercised by the
9 purchaser; [7] defendant's intent in selecting the mark; and
10 [8] likelihood of expansion of the product lines.

11 *Id.*

12 These factors are flexible. They are meant to be adapted to the
13 particular circumstances of a case. *JL Beverage Co. v. Jim Beam Brands*
14 Co., 828 F.3d 1098, 1106 (9th Cir. 2016). Defendant analyzes them all
15 to ensure Plaintiff is given the maximum benefit of the evidence.

16 **1. The Servicemark is Weak.**

17 Like all trademarks, the strength of Plaintiff's mark is measured
18 on a spectrum of strong to weak. Strong marks stand out more than
19 others, and they are more likely to be remembered. And thus, we award
20 them with greater protection. *Brookfield Communs., Inc. v. W. Coast*
21 *Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999). The Ninth Circuit has two
22 relevant measurements to evaluate the strength of a mark: (1) conceptual
23 strength and (2) commercial strength. *Network Automation, supra*, 1149.

24 Conceptual strength is the classification of a mark over a spectrum
25 of five categories that gradually increases along with the mark's
26 distinctiveness. The spectrum begins from the least distinct generic,
27 then goes onto descriptive, suggestive, arbitrary, and fanciful.
28 Whether a mark is conceptually strong depends on the obviousness of the
mark's connection to the services it refers. *Network Automation, supra*.
And commercial strength is based on "actual marketplace recognition."

1 *Id.*

2 A mark's strength depends, of course, upon the goods and services
 3 the mark promotes. A helpful example would be "the mark BRILLIANT may
 4 be 'descriptive' on diamonds, 'suggestive' on furniture polish, and
 5 'arbitrary' on canned applesauce." *Rodeo Collection, Ltd. v. W.*
 6 *Seventh*, 812 F.2d 1215 (9th Cir. 1987).

7 Infinity Energy markets Solar energy systems. (SUF 1, 30, 38)
 8 Solar energy derives from the Sun. (SUF 9) Nothing in Plaintiff's
 9 evidence shows a foreseeable depletion of the Sunshine, and no
 10 reasonable person could say that the Solar power of the Sun has a set
 11 limit. Even Plaintiff's banner says "There's never a shortage of Solar
 12 energy." Dictionaries also confirm that the word Infinity describes
 13 an unlimited extent of time, space or quantity. (SUF 6) It is the
 14 dictionary definition alone that connects Plaintiff's servicemark
 15 Infinity Energy to Solar energy.

16 One thing the Plaintiff does not dispute, and cannot dispute, is
 17 the abundance of Sunlight. (SUF 39) The record is devoid of any
 18 objective evidence showing that Infinity Energy refers to a limited
 19 energy source. There is no evidence to show, say, when consumers hear
 20 the word Infinity Energy, they are reminded of gas & oil. The road from
 21 Infinity to the Sun does not take a great mental leap.

22 Because Infinity Energy describes the infinite character of Solar
 23 energy, it is suggestive at best. It did nothing to earn the strong
 24 level of protection we award trademarks that actually stand out.

25 But even if a jury member were to determine that promoting Solar
 26 energy with the name Infinity Energy is somehow a powerful concept –
 27 and it is not – Plaintiff hasn't shown a type of commercial success that
 28 may have bolstered the mark's strength either. Plaintiff declares

1 itself as a "leader" in the Solar industry of Northern California. (Am.
2 Compl. ¶ 9) Plaintiff's evidence is just ads, brochures, and websites.
3 Anyone could have printed it out in their garage the day before filing
4 suit. (SUF 30, 39) There is nothing objective that could lead a
5 reasonable person to conclude that Plaintiff is so commercially famous
6 that any trademark similar to Plaintiff's servicemark is probably
7 making consumers be confused. In fact, there is nothing in Plaintiff's
8 evidence that could help the fact finder ascertain what Plaintiff's
9 actual marketplace recognition is. Nothing in the record could
10 objectively convey the idea that Plaintiff's brand is well-known, and
11 nothing could show the trier of fact that Plaintiff's mark is notable.

12 That is because whether consumers are likely confused or not is
13 going to depend at least on the consumers' general level of awareness.
14 Plaintiff claims that it has a "strong brand recognition." (Am. Compl.
15 ¶ 25) But we are not told who recognizes Plaintiff. We are not told
16 how many people recognize Plaintiff. We are not told to what extent
17 they recognize Plaintiff. (SUF 21, 28) And let us remember, this can't
18 just be about one customer. The jury needs to determine that "an
19 appreciable number of people" are confused. *Entrepreneur Media v.*
20 *Smith*, 279 F.3d 1135 (9th Cir. 2002).

21 Nor the mark comes even close to being original. There are
22 currently 66 live registered trademarks with the word Infinity,
23 including those with alternate spelling (e.g. Defendant's use of
24 Infinite) that are registered under Class 037. (SUF 11) That is the
25 same class Plaintiff registered its servicemark. There are at least 20
26 live trademarks at the USPTO that uses the word Infinity to market
27 Solar energy. (SUF 12) And there are at least 841 live registered
28 trademarks with the word Energy in the Solar industry. (SUF 13) If the

1 case were to end up at trial, a group of twelve jury members will be
2 paneled to answer questions like: How strong is the mark if dozens of
3 people in the same industry use it too? Without looking at anything,
4 do you think there's a chance the public knows Plaintiff well enough?
5 Can you feel how many people know of Plaintiff? Can you try to guess
6 if they would be confused?

7 The evidence submitted with this motion is watered down to help
8 Plaintiff, yet Plaintiff still does not have a leg to stand on. Just
9 to illustrate the point: The foreign businesses abroad who use the name
10 Infinity Energy are omitted from the record. The numbers consist of
11 similar names used by American businesses and in America only. And
12 within the American marketplace, the search is narrowed down to include
13 only the number of people who actually entered the name for registration
14 at the USPTO. And within those people, the numbers include only the
15 registry entries that are live and active at present. (SUF 11-13)

16 Even Plaintiff's Chief Sales Officer, Cameron Kelly doesn't
17 believe that Infinity Energy is a unique name —and he came up with
18 it. (SUF 7)

19 As the most flattering evidence for Plaintiff, the numbers ignore
20 all accounts of parties who have already thought of the idea and moved
21 on since. The evidence also leaves out all accounts of relevant mark
22 owners who forgot or just did not know about the periodic maintenance
23 filings that lapsed the marks. So, to Defendant's detriment, even if
24 we were to turn a blind eye to any prior uses that may still be confusing
25 Americans², Plaintiff's mark is still a pedestrian affair.

26 **2. The Proximity of Services is not Good Enough**

27
28

² Those, perhaps, have no idea that the business they know has since closed.

1 The Ninth Circuit held that the proximity of goods or services
 2 rest on a sliding scale. "Goods are proximate if the goods are similar
 3 in use and function." *Sleekcraft*, supra, 350. When a mark is weak, the
 4 proximity of goods factor is weightless in the likelihood of confusion
 5 analysis. That is because, as Ninth Circuit explains the "approach
 6 takes into account the fact that consumers may well recognize that
 7 [parties] use terms for what the word means, not because of an
 8 association with any one company." *Entrepreneur Media v. Smith*, 279
 9 F.3d 1135, 1148 (9th Cir. 2002). Thus, the Ninth Circuit logically
 10 concludes "there is a broad societal interest in preserving common,
 11 useful words for the public domain."

12 The longstanding consensus of the Ninth Circuit shows that the
 13 proximity between Plaintiff and Defendant's services does not purport
 14 to weigh much because Plaintiff's mark is already bordering fragile
 15 both as a concept and as a commercial attempt. In these instances,
 16 Ninth Circuit prioritizes the interests of society.

17 Here, the societal interest is the people's right to look at a
 18 word not uncommon in English and interpret the word for what it actually
 19 means. And again, in the name of awarding Plaintiff the maximum benefit,
 20 even if we were to imagine that the mark is so strong to the point it
 21 warrants this Court to prohibit the public from using it³, this factor's
 22 ability to support Plaintiff is slight at best. Then it is repetitively
 23 overwhelmed by the remaining seven factors.

24 Still standing under the best light for Plaintiff. Parties do not
 25 dispute that Plaintiff's mark is used within the Solar energy industry.
 26 (SUF 1) Parties do not dispute that Defendant also occupies space in
 27

28 ³ A scenario that would open the door to market domination through exclusive claims over language and turn the Lanham Act's stance against unfair competition on its head.

1 the Solar industry. (SUF 14, 31) Parties do not dispute that Defendant
2 uses the commercial name Infinite Energy and in marketing its business.
3 (SUF 14, 31) And as far as Defendant has been able to discover,
4 Plaintiff does not dispute that Defendant provides goods and services
5 outside of Solar, for example, electrical services, installation of
6 windows, doors, HVAC, and so on. Despite some overlap Solar industry,
7 Plaintiff has not disagreed that Defendant's business does more than
8 just Solar.

9 As Plaintiff pointed out, Defendant makes commercial use of the
10 name Infinite Energy for Defendant's business. (SUF 14, 31, 33) Defendant
11 used the word Infinity Energy at some point. (SUF 32) Often times the
12 name is short for Defendant's alternative name "Infinite Energy Home
13 Services." (SUF 14) Both can be seen on the home page of the Defendant's
14 website —the same website Plaintiff identified in its Complaint (the
15 "Defendant Website") (SUF 31) (Am. Compl., ¶ 15) Defendant Website
16 displays other items in addition to Solar energy, including sale of
17 goods and services for domestic use outside of Solar, such as electrical
18 services, installation of windows, doors, HVAC, and so on.

19 But this is not the place to determine the truth behind whether
20 Defendant is actually providing those goods and services.

21 Instead, the record establishes the following: (1) Plaintiff
22 acknowledges that Defendant Website belongs to Defendant, (2) Defendant
23 Website displays advertising for other goods and services than just
24 Solar energy, and (3) Defendant Website features terms such as Whole
25 House Fans," "Electrical Services," Home Energy Audit".

26 On the other side of the coin, Plaintiff does not have evidence
27 that may suggest Defendant Website does not feature any of it. But
28 since we do not weigh the credibility of evidence at this stage,



1 Defendants' other ventures are still irrelevant. Instead, the point is
 2 a reasonable jury member looking at Defendant Website will likely infer
 3 that Defendant uses a tradename unidentical to Plaintiff in connection,
 4 not just with Solar energy, but also with other market industries. This
 5 likelihood is of probative value.

6 Equally probative is, Plaintiff registered Infinity Energy as a
 7 servicemark. And 15 U.S.C. § 1127 defines a servicemark as "any word,
 8 name, symbol, or device, or any combination thereof— used by a person
 9 . . . to identify and distinguish the services of one person, including
 10 a unique service, from the services of others and to indicate the source
 11 of the services, even if that source is unknown." The statute excludes
 12 the word "goods" in that definition.

13 As to the rights Lanham Act confers to Plaintiff, they are in the
 14 Plaintiff's registration certificate. (SUF 1-5) Another fact not in
 15 dispute, Plaintiff can use its mark to install "Solar energy systems
 16 and alternative energy products for residential and commercial use."
 17 (SUF 1) This shows that Plaintiff already narrowed the scope of the
 18 mark's rights under the Lanham Act. Plaintiff never amended the mark's
 19 registration, nor its application to change the services provided under
 20 the mark. Plaintiff neither added nor removed any international classes
 21 throughout the prosecution history of the mark. Nor Plaintiff amended
 22 the mark after its registration. Plaintiff's sole change to the
 23 servicemark was when Plaintiff was forced to disclaim the exclusive
 24 rights to the word energy. (SUF 41)

25 And now, Plaintiff cannot step outside the line it drew around
 26 itself.

27 Imagine Defendant owns two stores. Down the road, it has a is
 28 Solar energy store. Up the road, it has an Electrical store that

1 replaces sockets, and happens to fall under the general umbrella of the
2 business name as a whole. Presumably, Congress did not intend to give
3 Plaintiff the right to throw a statutory rope around the Electrical
4 store's neck and yank it out the market, then justify the murder with
5 phonetics.

6 Plaintiff has a "limited property right" in the mark. *New Kids on*
7 *the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992) There
8 may be some overlap in the services, but it slides low on the Ninth
9 Circuit scale.

10 **3. The Names are Different**

11 To distinguish the names, we follow Ninth Circuit's three axioms:
12 "(1) Marks should be considered in their entirety and as they appear
13 in the marketplace, (2) Similarity is best adjudged by appearance,
14 sound, and meaning; and, (3) Similarities weigh more heavily than
15 differences. *Entrepreneur*, *supra*, 1144.

16 Assuming that we are a customer in the marketplace, here are the
17 two marks:



23 **PLAINTIFF**

23 **DEFENDANT**

25 (SUF 42-43) At a first glance, they are different. While the
26 artistry is pleasing, Plaintiff does not actually own the rights to
27 it. (SUF 2) But if it benefits the Plaintiff, we consider it regardless.
28 Yes, Infinity and Infinite are two different but similar words. But

1 that is it. And it is not enough. We cannot discount the single
2 linguistic similarity, but viewing the marks a whole, a reasonable jury
3 is more likely to find the marks more different than similar.

4 The marks do not share a color palette, do not share fonts, and
5 do not share illustrations. Even their verbal aspect consists of
6 different phrases and intersect only at Infinity for Plaintiff and
7 Infinite for Defendant –words that are already different. The single
8 remaining intersection is the word Energy, which is disclaimed by
9 Plaintiff, and currently in use nationwide by at least 841 parties in
10 the same industry. (SUF 13)

11 Defendant's centerpiece alone mitigates the likelihood of
12 confusion. It is a bright green thunderbolt, larger in size compared
13 to the rest of the tradename. Defendant's name reads INFINITE ENERGY
14 HOME SERVICES. Below it are the words, "SOLAR - ROOFING - ELECTRICAL -
15 HOME BATTERY - HVAC - WINDOWS." That is the last batch of straws that
16 finally breaks the proverbial camel's back. (SUF 43)

17 The Ninth Circuit also notes, "use of similar marks by third-party
18 companies in the relevant industry weakens the mark at issue." *M2*
19 *Software, Inc. v. Madacy Entm't*, 421 F.3d 1073 (9th Cir. 2005) See *Miss*
20 *World (UK) Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1449
21 (9th Cir. 1988) The dozens of other similar names in the marketplace
22 proves the point.

23 **4. Actual Confusion. There is none.**

24 Courts have consistently held that the evidence of actual
25 confusion is a strong indication that confusion is also likely in the
26 future. *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1393 (9th
27 Cir. 1993) And actual confusion can be proven by a reliable and relevant
28 survey. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt.*,

1 618 F.3d 1025, 1035 (9th Cir. 2010)

2 None of this is to say that Plaintiff needs evidence of actual
3 confusion to prevail on this motion for summary judgment. And it is
4 certainly not mandatory for Plaintiff to submit a survey. Yet it is
5 troubling that Plaintiff chose not to. Because "the absence of a survey
6 can be telling," and "a lack of evidence of actual confusion may
7 strongly indicate that confusion is unlikely" *Morrison Entm't Grp. Inc.*
8 v. *Nintendo of Am., Inc.*, 56 F. App'x 782, 785 (9th Cir. 2003). (SUF 20)

9 The plain text of Plaintiff's allegations is that Defendant's
10 "activities have caused and unless enjoined by this Court, will continue
11 to cause a likelihood of confusion and deception (Am. Compl. ¶ 32) But
12 Plaintiff did not identify a single person who bought Defendant's
13 services thinking it was Plaintiff's services. (SUF 19)

14 Defendant conducted the deposition of a designed 30(b) (6)
15 representative as the person most qualified to speak for Plaintiff. And
16 Mr. Kelly only provided vague hearsay accounts of having heard instances
17 of some confusion. When pushed further, Mr. Kelly admitted that he had
18 no direct knowledge of the inquiries Plaintiff allegedly received from
19 third parties attempting to reach Defendant instead of Plaintiff.
20 (SUF 19, 22) These vague reports of customer inquiries, particularly
21 when they are delivered by unidentified people to unidentified staff
22 on unspecified dates without a shred of documentation, do not exhibit
23 actual confusion. It only exhibits a chain of inadmissible hearsay.

24 Mr. Kelly could not even say for certain how many people had bought
25 Defendant's services thinking Defendant was Plaintiff. According to Mr.
26 Kelly, Plaintiff failed to track any communication displaying customer
27 confusion. (SUF 19, 22, 28)

28 District courts come across these situations regularly. One court



1 disregarded allegations of consumer confusion because plaintiff did not
 2 provide any names, dates, details, or documents supporting the alleged
 3 confusion. *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 290 F.
 4 Supp. 2d 1083, 1094 (C.D. Cal. 2003). The court ruled “[Plaintiff]
 5 cannot substantiate its claims of actual confusion, which the Court
 6 finds to be unreliable and nothing more than inadmissible hearsay.” *Id.*

7 Another court also discounted plaintiff’s allegations that
 8 defendant was confusing people because, the court found, tales of phone
 9 calls of unidentified consumers, conversations between unidentified
 10 staff and identified persons were inadmissible hearsay. It did not
 11 amount to confusion. *Avery Dennison Corp. v. Acco Brands, Inc.*, No.
 12 CV99-1877DT(MCX), 1999 WL 33117262, at *18 (C.D. Cal. Oct. 12, 1999)
 13 see also *Duluth News-Tribune v. Mesabi Pub. Co.*, 84 F.3d 1093, 1098
 14 (8th Cir. 1996) (“vague evidence of misdirected phone calls and mail
 15 is hearsay of a particularly unreliable nature given the lack of an
 16 opportunity for cross-examination of the caller or sender regarding the
 17 reason for the ‘confusion’”) Even if the evidence was somehow
 18 admissible, the Court continued, the ““proof” of actual confusion is
 19 unclear and insubstantial . . . these statements do not contain any
 20 basis for the confusion.” *Id.*

21 The same can be said for Mr. Kelly. His accounts of having heard
 22 things is the exact kind of evidence already barred by caselaw.

23 Another document Plaintiff produced is a single email
 24 correspondence dated March 10, 2022 Plaintiff received from a third
 25 party as “evidence” of confusion. But the person who sent this email
 26 is not confused. He is not talking about Plaintiff. He is talking about
 27 Defendant. In the email, he says, “I’ve called and emailed Rich . . .”
 28 and “Rich advised me that PG&E . . .” (SUF 44) Rich Walton is the Chief

1 Executive Officer for Defendant. (SUF 40) This person seems to be bad
2 with company names. And this email is not evidence of actual consumer
3 confusion.

4 For the remaining isolated instances of consumer "evidence"
5 Plaintiff's expert says "people do often confuse the words INFINITY and
6 INFINITE" which, he says "can be demonstrated with an ordinary Google
7 search." If he tries to fill the search box with "an infinity number
8 of" to order to retrieve results for this exact phrase, Google attempts
9 to correct this to "an infinite number of." He notes "even Google seems
10 to be confused." (SUF 23)

11 Defendant's rebuttal expert finds this experiment "disturbing."
12 Search results are not evidence of people being actually confused.
13 (SUF 29) Google is not a human being. A number of courts happen to
14 agree.

15 One court having come across a near identical situation and
16 explained "[t]o the extent that Plaintiff is relying on the Google
17 search engine's propensity to auto-correct searches for "oculu" to
18 searches for "oculus" or to intermingle "oculu" and "oculus" search
19 results, such evidence is not evidence of customer confusion. *Oculu,*
20 *LLC v. Oculus VR, Inc.*, No. SACV 14-0196 DOC, 2015 WL 3619204, at *13
21 (C.D. Cal. June 8, 2015); see also *Dahl v. Swift Distribution, Inc.*,
22 No. CV 10-00551 SJO(RZX), 2010 WL 1458957, at *9 (C.D. Cal. Apr. 1,
23 2010) (declining "to accept plaintiff's contention that the alleged
24 confusion of the google search engine indicates that consumers are
25 actually confused") The court remarked that the use of another's
26 trademark as a search engine keyword does not actually violate the
27 Lanham Act. *Id.* In this instance, this "evidence" of consumer confusion
28 is nothing more than Google correcting Mr. Farrell's grammar.



1 Another "evidence" Plaintiff's expert distorts as actual evidence
2 of consumer confusion is a 2015 webpage with testimonials for an
3 Australian company named Infinite Energy on which two users use the
4 word Infinity instead of Infinite to refer to the Australian company.
5 (SUF 26)

6 Not only this is not evidence of actual consumer confusion. It is
7 also not an alleged confusing use by Defendant. Nor this evidence
8 affects the United States commerce. This Court cannot be asked to
9 adjudicate the activities of an Australian company that may be causing
10 confusion somewhere in the great wide world without a shred of evidence
11 of American involvement. And even in a fairyland where this Court could
12 somehow reach outside of the U.S. territories to regulate the commerce
13 of the Commonwealth of Australia, Defendant is not the correct party
14 to that fictional lawsuit.

15 Plaintiff's showing of consumer confusion is at best conjecture,
16 and at worst imaginary. It would have helped if there was a consumer
17 survey. But there is none. So, not only Plaintiff cannot give much to
18 the jury to help gauge the likelihood of consumer confusion, but the
19 fact that it can't, helps this Court gauge the likelihood of Plaintiff's
20 meeting its burden of proof at trial. Both seem to be low.

21 **5. Marketing Channels do not Evidence Consumer Confusion**

22 When it comes to location, there are seven states that came up in
23 discovery. Plaintiff occupies all seven. (SUF 17) Defendant occupies
24 three counties in only one state –something Plaintiff's evidence does
25 not dispute. (SUF 18) Plaintiff has not provided any concrete evidence
reflecting that Defendant travels to New Jersey to provide its services.
26 Nor Plaintiff produced any evidence that Defendant travels Colorado,
27 Florida, Idaho, Nevada or Texas.



1 But since we are still under the same favorable light benefitting
 2 Plaintiff, even assuming Plaintiff could somehow come up with some
 3 evidence without the help of discovery (which remains strictly closed)
 4 this factor is still trivial. Even if Plaintiff could conjure something
 5 up post-discovery and manage to get it admitted into evidence, no
 6 reasonable jury member could make a conclusive determination of likely
 7 consumer confusion while the jury is also considering seven other
 8 factors simultaneously –all of which soften whatever importance this
 9 factor could ever hold.

10 The websites. According to the Ninth Circuit, this seems to be
 11 borderline useless. Because virtually all businesses have a website,
 12 the Ninth Circuit explains. “[I]t would be rare commercial retailer
 13 that did not advertise online,” the Ninth Circuit explains, then applies
 14 the fact to the Lanham Act context. The Court concludes, “the shared
 15 use of a ubiquitous marketing channel does not shed much light on the
 16 likelihood of consumer confusion.” *Network Automation, supra*, 1151.

17 Using identical marketing channels of the Internet, each website
 18 would appear within search results, and “[g]iven the broad use of the
 19 Internet today, the same could be said for countless companies. Thus,
 20 this factor merits little weight.” *Playboy Enters. v. Netscape Communs.*
 21 Corp.

22 Here, Parties do have the Internet in common. (SUF 29-30)
 23 Plaintiff’s Complaint even identifies Defendant’s Internet
 24 presence. (Am. Compl. ¶ 15.) Plaintiff does not have much in evidence
 25 about other relevant marketing channels for Defendant. The only
 26 cognizable connection remaining from Plaintiff’s evidence is three
 27 counties in one state out of the seven states Plaintiff is in. And the
 28 minimal value of the shared geography is outweighed by the Ninth

1 Circuit's recognition of the undisputed realities of the Internet.

2 **6. These Buyers are Careful.**

3 Courts traditionally consider the reasonably prudent buyer
4 exercising ordinary caution and how careful they are in their purchases.

5 *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385 (9th Cir. 1993)

6 Because it can correct those accusing the buyer of being confused.

7 There is a greater chance of likelihood of confusion if the consumer

8 is not too careful in making a purchase. *Playboy Enterprises, supra*,

9 1028. But if the buyer knows what he's getting into, if he is paying
10 attention, he is unlikely to be confused about the service he examines.

11 Plaintiff proves the point. In this case, buyers are careful and
12 well-informed because Plaintiff makes them so. In fact, Plaintiff
13 ensures it. For example, if one wants to go Solar and reaches out to
14 Plaintiff, he can send them a Letter of Intent. With the Letter of
15 Intent, a potential buyer sends Plaintiff personal information about
16 himself and his home, including name, address, phone number, and home
17 information (including energy usage and roof type.) Then there's the
18 appointment form. On the appointment form, Plaintiff says it would like
19 to schedule an appointment with the buyer. (SUF 37, 39)

20 The buyer can even enter into a Power Purchase Agreement with
21 Plaintiff. So a buyer can have Plaintiff install, own, and operate
22 energy out of the buyer's own property for a set period of time. The
23 buyer can also choose to sign a lease agreement with Plaintiff and make
24 monthly payments. Plaintiff even offers a Solar loan. With the loan
25 from Plaintiff, the buyer can take on debt to finance their Solar
26 energy. (SUF 38) In any event, whichever commitment buyer selects,
27 Plaintiff's agents come over to buyer's property and they work on the
28 property for 6-8 weeks. (SUF 45) And the buyer is contractually bound

1 to Plaintiff.

2 This does not seem to be a one-click purchase. Plaintiff's evidence
3 shows that Plaintiff gives buyers plenty of opportunities to exercise
4 a high level of care, and Plaintiff even offers a consultation. (SUF
5 46) When it comes to Plaintiff's services the buyer can't be hasty even
6 if he wanted to.

7 And because the transaction is not casual, the likelihood that
8 these customers would be confused is slim to none. Instead, a potential
9 customer is sufficiently familiar with the facts because the evidence
10 shows that Plaintiff ensures its customers are staying well-informed
11 and not purchasing on impulse.

12 During a trademark misappropriation case for ale, Lord Macnaughten
13 once said: "Thirsty folk want beer, not explanations." *Am. Auto. Ins.
14 Co. v. Am. Auto Club*, 184 F.2d 407 (9th Cir. 1950), citing *Montgomery
15 v. Thompson*, 1891, A.C. 217, 225.)

16 This is no beer.

17 **7. Defendant's Intent is Missing from the Record.**

18 Of course, Defendant's intent is irrelevant for Plaintiff to prove
19 a likelihood of confusion. But one piece of evidence that strongly
20 indicates a likelihood of confusion is Defendant's intent. *Brookfield,
21 supra*, 1059. Here, Plaintiff none of it.

22 When Mr. Kelly was asked to explain Plaintiff's claim that
23 Defendant allegedly knew of Plaintiff's servicemark beforehand, he
24 admitted that he had no personal knowledge about it. When Mr. Kelly
25 was asked whether he had any personal knowledge about whether Defendant
26 allegedly intended to exploit Plaintiff's brand, Mr. Kelly revealed
27 that he could only make assumptions. (SUF 47)

28 Then he recited a vague account about some prospective customers

1 he heard of, who are probably going to Defendant instead of Plaintiff,
2 because the customers are probably confused, and it would probably be
3 pretty obvious to Defendant that Plaintiff set them up. "Defendant
4 would have willfully taken the customer," said Mr. Kelly said. But
5 Plaintiff failed to provide any evidence in support of this 20-car
6 pile-up of possibilities. As to the people associated with Plaintiff
7 who knew about Defendant's alleged willful conduct, Mr. Kelly was
8 unaware of anyone. (SUF 47)

9 Other notable absentees in the record further tip the scales in
10 Defendant's favor. Nothing here suggests that Defendant had any ill-
11 intent in choosing its tradename. Nothing suggests that Defendant
12 selected its tradename in an attempt to associate itself with Plaintiff.
13 Nothing suggests that Defendant tried to benefit from Plaintiff's
14 servicemark. And nothing under the Sun suggests any reason at all as
15 to why Defendant would want to do any of that.

16 Interestingly enough, Plaintiff does have evidence that Plaintiff
17 knew of Defendant and its tradename before Plaintiff applied to register
18 Plaintiff's mark. Not that it's relevant to this motion.

19 **8. Expansion in Product Lines is Irrelevant.**

20 Where two companies are direct competitors, this factor is
21 unimportant. Network Automation, *supra* 1153; see also Playboy Enters.,
22 354 F.3d 1020 (ruling that expansion factor is not relevant when goods
23 are already related.)

24 Plaintiff and Defendant are both in the Solar energy industry.
25 This item does not hold much weight and it is not factored into the
26 analysis.

27 **C. Defendant is Unlikely to Confuse.**

28 Without the likelihood of consumer confusion element, anyone could

1 claim exclusive rights to a word so long as they are the first in line
2 at the government doorsteps to register it. Because the Lanham Act is
3 designed to prevent unfair competition, it is no surprise that the word
4 Confusion is repeated multiple times throughout the statute. The focus
5 of the Lanham Act is not uses of a registered trademark. The focus of
6 the Lanham Act is uses of a registered trademark that confuse.

7 This motion fleshes out each Sleekcraft factor. At the end of the
8 day, Plaintiff does not have enough evidence. The jury will not have
9 much to look at, and that is a matter of law.

10 **D. Plaintiff Cannot Link Defendant to Alleged Injuries.**

11 As discussed, there is no issue of material fact and they are not
12 enough to take to a jury. Thus, Defendant merits summary judgement on
13 all counts.

14 If the Court enters judgment in favor of Defendant, then for the
15 purposes of this Court, the issues discussed below are irrelevant.

16 But if the Court does not enter summary judgement, then Defendant
17 alternatively moves for partial summary judgement concerning
18 Plaintiff's monetary relief and right to a jury trial.

19 **E. Defendant Requests Partial Summary Judgment on Damages.**

20 California law and the Lanham Act permit recovery of monetary
21 damages for infringement and lost profits. But only if Plaintiff
22 successfully shows that the alleged infringement and loss of profits
23 are attributable to Defendant. 15 U.S.C. § 1117(a); Cal. Bus. & Prof.
24 Code § 17204.

25 California law's unfair competition limits Plaintiff's recovery
26 of money damages only to restitution and injunctive relief. Cal. Bus.
27 & Prof. Code §§ 17203 and 17204; *Pfizer Inc. v. Sup. Ct.*, 182 Cal. App.
28 4th 622, 631 (Ct. App. 2010). The burden is on the Plaintiff to prove

1 the fact and the amount of the damages Plaintiff alleges to have
 2 suffered. *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1407
 3 (9th Cir. 1993), rev'd on other grounds. But Plaintiff lacks evidence
 4 of the amount of the damages. In fact, Plaintiff lacks evidence that
 5 it suffered damages.

6 "A party cannot obtain monetary relief based upon vague and
 7 unsupported assertions of harm." See *Edge Games, LLC v. Houghton Mifflin*
 8 *Harcourt Publ'g Co.*, No. EDCV 13 02123 VAP (DTBx), 2015 WL 3498607, at
 9 *6 (C.D. Cal. June 2, 2015) (granting summary judgment on plaintiff's
 10 claim for actual damages because there was no evidence of lost profits,
 11 and the plaintiff's most qualified Rule 30(b)(6) person did not know
 12 of the lost profits that resulted from the alleged infringement).

13 Here, there is no evidence of any damage, let alone a specific
 14 amount of damages Plaintiffs would be entitled to recover. The record
 15 just contains vague and inadmissible estimates.

16 In fact, no objective evidence exists that explains how Plaintiff
 17 came to conclude that Defendant harmed Plaintiff. Nor is there an expert
 18 analysis on it. In fact, there is no expert analysis of anything related
 19 to Plaintiff's alleged damages.

20 Cal. Bus. & Prof. Code § 17200 does not help Plaintiff either. If
 21 applicable it may have allowed Plaintiff to be returned the money
 22 Defendant supposedly obtained from Plaintiff by unfair business
 23 practices. Plaintiff does not have any evidence that Defendant
 24 allegedly violated Plaintiff's rights and then took Plaintiff's money.
 25 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144-52.

26 The Lanham Act gives Plaintiff one last chance to make some money
 27 out of this lawsuit. Perhaps a party can recover "(1) as a substitute
 28 measure of damages for Plaintiff's own damages when the parties are in

1 direct competition and Defendants' sales are attributable to the
2 infringing conduct or (2) when trademark infringement is 'willfully
3 calculated to exploit the advantage of an established mark.'" *Blau v.*
4 *YMI Jeanswear, Inc.*, No. CV 02-09551 FMC (SHSx), 2004 WL 5313967, at
5 *3 (C.D. Cal. Jan. 2, 2004) (quoting *Lindy Pen*, 982 F.2d at 1405, 1407-
6 08) (dismissing all claims for damages on summary judgment). But only
7 if Plaintiff is successful in its trademark infringement claim.

8 Shining a light ever most favorable over Plaintiff, even if
9 Plaintiff can somehow lead anyone to believe that Defendant's tradename
10 is probably confusing not just one person, but an appreciable number
11 of people, Plaintiff's materials still lack objective facts regarding
12 Plaintiff's alleged injuries. Here, not one reasonable juror could
13 possibly conclude that Plaintiff lost any money, let alone it lost a
14 specific number of dollars.

15 Plus, Plaintiff accused Defendant of intentionally taking
16 advantage of Plaintiff's goodwill and recognition yet cannot provide
17 anything concrete that Defendant was indeed malicious. Already above,
18 we discussed it, dissected it, and came up empty.

19 **F. Plaintiff Cannot Proceed to a Jury**

20 If this Court finds that Plaintiff's claim to a monetary relief
21 is not viable, then Plaintiff loses the right to a jury trial.

22 The Constitution of the United States, through the Seventh
23 Amendment, only preserves the right to a jury for claims at law, not
24 at equity. *Anhing Corp. v. Thuan Phong Co.*, No. CV 13-05167, 2015 WL
25 4517846, at *4 (C.D. Cal. July 24, 2015), appeal dismissed (Oct. 14,
26 2016) (citing U.S. Const. amend. VII; *Danjaq LLC v. Sony Corp.*, 263
27 F.3d 942, 962 (9th Cir. 2001) What's left is Plaintiff's one final
attempt at seeking an injunction, an equitable remedy that stops

1 Plaintiff from facing a jury. See *AntiMonopoly, Inc. v. General Mills*
2 *Fun Group*, 611 F.2d 296, 308 (9th Cir. 1979) (affirming order vacating
3 jury trial after legal claims were dismissed and only equitable claims
4 remained).

5 That is what Plaintiff can get from this suit at the very, very
6 best. Though the Sun does not shine too bright on this one either.

7 **CONCLUSION**

8 This Court is not the proper venue for claims of imagination.
9 Plaintiff does not have a coherent story of a violation of its rights.
10 The Lanham Act intends to discipline those likely causing deception
11 among consumers, so that the market remains fair and honest for us all.
12 But the Lanham Act does not carve out an exception for conspiracy
13 theories.

14 Defendant requests entry of summary disposition in full.

15
16
17 DATED: APRIL 24, 2023

KROGH & DECKER, LLP

18
19 By: /cagil arel/

20 CAGIL AREL
21 Attorney for Defendant,
22 Infinite Energy Home Services,
23 Inc.
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